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No. 86-1217

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the termination of the investigation in this case for lack of prosecutorial merit renders moot respondents' prayers for injunctive and declaratory relief.

2. Whether a federal court exceeds its constitutional authority under Article III when, in the absence of any legislatively created cause-of-action and standards, it entertains a pre-indictment challenge to the manner and scope of the noncoercive investigative activities of a United States Attorney.

3. Whether, assuming that Article III in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive investigatory activities by a United States Attorney, a federal court may enjoin or declare unconstitutional such activities when those activities were not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose.

PARTIES TO THE PROCEEDING

Petitioners are Joseph P. Russoniello, the United States Attorney for the Northern District of California, and David Ilchert, the District Director for the United States Immigration and Naturalization Service for the San Francisco Bay Area. Louis Bergna, James D. Boitano, Marvin Church, William D. Curtis, Arthur Donner, Barbara Greenslake, Eve Lewis, George A. Mann, John Meehan, Richard Neal, William A. O'Malley, Jay Patterson, James Riggs, Arlo Smith, Keith Sorenson, Gene L. Tunney, Lon Underwood, and Ross Underwood are defendants with petitioners in the proceedings below.

Respondents are Jose J. Olagues, the Chinese for Affirmative Action, the Hispanic Coalition for Human Rights, and the San Francisco Latino Voter Registration Education Project.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc Court of Appeals for the Ninth Circuit (Pet. App. 1a-38a) is reported at 797 F.2d 1511. The prior panel opinion of the court of appeals (Pet. App. 41a-75a) is reported at 770 F.2d 791. The opinions of the district court on summary judgment (Pet. App. 78a-95a) and on motion to dismiss (Pet. App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A suggestion for rehearing en banc by the full court of appeals was denied on December 19, 1986. On November 14, 1986, Justice O'Connor extended the time within which a petition for a writ of certiorari could be filed to and including January 23, 1987, and such a petition was filed on that date. On April 20, 1987, the Court issued a writ of certiorari and invited the

parties to brief and argue the question of possible mootness. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America[]
>
> * * * * *
>
> * * * he shall take Care that the Laws be faithfully executed * * *.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * to all Cases, * * * to Controversies * * *.

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

42 U.S.C. 1973i(c) provides in pertinent part:

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elec-

> tor, Member of the United States Senate, Member of the United States House of Representatives * * *.

California Government Code § 6253.6 (West Supp. 1987) (underscoring omitted) provides:

> (a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.
>
> (b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is otherwise authorized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

STATEMENT

1. Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California (Pet. App. 3a); co-petitioner, David Ilchert, is the District Director in San Francisco for the Immigration and Naturalization Service (INS) (*id.* at 5a). In March 1982, Russoniello received information from various sources indicating that, in one of the counties in his district, a substantial number of foreign-born persons who were not United States citizens had registered to vote, even though as noncitizens they were ineligible to do so (*id.* at 25a; J.A. 175-176).[1] Russoniello learned from the

[1] Among other things, Russoniello received a newspaper article which reported that the district attorney of Santa Clara County, California had conducted a study showing that a significant number of foreign-born noncitizens had registered for and then voted in

district attorney of that county that many of these noncitizen registrants either did not speak or were not fluent in English and, furthermore, that many had been told by the persons registering them that they were in fact eligible to vote, either because they were married to a United States citizen or because they had resided in this country for a long period (Pet. App. 25a-26a; J.A. 177-178).

Based on these facts suggesting that certain persons or organizations were registering or conspiring to register noncitizen voters in violation of 42 U.S.C. 1973i(c), and motivated in part by concern that the results of the upcoming June 8, 1982 California primary elections could be subject to challenge if noncitizen voting was widespread (Pet. App. 3a-4a, 25a-26a, 79a; J.A. 22-24, 177), Russoniello determined to investigate the extent of the noncitizen voter fraud registration problem in the San Francisco Bay Area (J.A. 177-179). Accordingly, on April 19, 1982, he wrote to the district attorneys and voter registrars in nine counties in his district requesting their assistance (Pet. App. 26a, 78a-80a; J.A. 178-179).[2] Russoniello explained that he had information indicating that a substantial number of noncitizens had recently registered to vote, that persons who did not understand English were the most susceptible to being confused or misled about their eligibility to do so,[3] and that such per-

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elections held in that county in 1980. See J.A. 176, 236; see also J.A. 23 (at least 20 of a 100 person sample were noncitizen registrants). See generally J.A. 206-215.

[2] The counties were Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, and Sonoma.

[3] Russoniello later learned that the Spanish translation of the voter registration form being used in these counties erroneously stated that a registrant "should" be, rather than "must" be, a United States citizen (Pet. App. 79a & n.1; J.A. 122). This fact confirmed Russoniello's suspicion that registration irregularities were most likely to occur among those who did not speak English (Pet. App. 79a & n.1; J.A. 179).

sons could be identified by their requests for bilingual ballots.[4] He therefore proposed that the voter registrar in each of these counties randomly select from public records and submit to him the names of 25 recently-registered, foreign-born voters who had requested such bilingual voting materials, which he would forward to the INS for verification of the registrants' citizenship status (Pet. App. 79a-80a; J.A. 22-26, 178).[5] Russoniello further suggested that, as to registrants whom the INS could not positively identify as citizens, the district attorneys should contact the registrants, determine whether they were citizens and, if not, determine who, if anyone, had encouraged them improperly to register (Pet. App. 43a, 80a; J.A. 24-25). He made clear that he did not intend

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[4] Though foreign-born individuals are required to learn English before they may become naturalized citizens (see 8 U.S.C. 1423(1)), the federal law in effect in 1982 required these nine counties to make available "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" (42 U.S.C. 1973aa-1a(c)), in Spanish as well as in English (Pet. App. 3a). The County of San Francisco had to make these materials available in Chinese as well (*ibid.*).

In 1984, these nine counties were relieved of their obligation under federal law to provide such bilingual election materials (Pet. App. 9a n.5; see also 49 Fed. Reg. 25887-25888 (1984)). Indeed, in November 1986, California voters adopted Proposition 63, an initiative now incorporated as Section 6 to Article III of the California Constitution, which provides that English is the "official language of California" and that public officials "shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced" (Cal. Const. Art. III, § 6). According to respondents (Br. in Opp. 12-13 n.8), Proposition 63 may bar the nine counties involved from providing bilingual voting materials.

[5] In 1982, voter registration information in the State of California, including records revealing the names of persons who had requested bilingual ballots, was a matter of public record. See Cal. Gov't Code §§ 6252, 6253 (West 1980). California law has since been amended, however, to provide that records revealing the identity of persons requesting bilingual ballots may not be made publicly available. See Cal. Gov't Code § 6253.6 (West Supp. 1987).

to prosecute any such noncitizen registrants, but would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters (J.A. 25).

The voter registrars subsequently submitted to the United States Attorney a total of 168 names (Pet. App. 43a, 80a). By checking its own records, as well as the fingerprint indices of the Federal Bureau of Investigation (FBI), the INS determined that 55 of these persons were in fact United States citizens, that 45 were definitely or probably not citizens, and that no records existed for the remaining 68 persons (*id.* at 80a; J.A. 64, 180). In late May 1982, Russoniello conveyed this information to the local district attorneys and again asked that they conduct interviews of those persons not positively identified as United States citizens (Pet. App. 5a, 80a; J.A. 62-66). Several of the local district attorneys did so, either by letter or by noncustodial contact (Pet. App. 80a-81a; see also J.A. 113-114, 155-156, 183-184, 187-188).

In September 1982, after reviewing the results of these efforts, the United States Attorney's office terminated its involvement in the investigation, turning the matter over to the FBI and the INS for routine handling pursuant to their statutory responsibilities (J.A. 180-181). The FBI apparently made some follow-up contacts during October 1982 (J.A. 223). The investigation was then terminated altogether. See Pet. App. 7a-8a, 27a, 44a; Br. in Opp. 5, 22; see also J.A. 102, 114, 156, 180-181, 184, 188, 190.

2. On May 12, 1982, however, before the investigation was terminated, respondents Jose J. Olagues, an Hispanic-American citizen whose name was randomly selected for investigation, and certain Hispanic-American and Chinese-American voting rights organizations filed this action against Russoniello and the other government officials involved in the investigation (Pet. App. 5a; J.A. 6-8).[6] Specifically alleging the course of events set forth

[6] Respondents subsequently moved for leave to file a second amended complaint adding two more individuals—Evelia Diaz-

above, respondents purported to bring their action on behalf of classes of plaintiffs who had requested foreign language election materials or had been deterred or were likely to be deterred from doing so, or who had participated in bilingual voter education efforts (J.A. 9-10). In particular, respondents asserted violations of the Fifteenth Amendment, the Equal Protection Clause, the Due Process Clause, the First Amendment, the Voting Rights Act of 1965, 42 U.S.C. (& Supp. III) 1971 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and a right of privacy guaranteed under the California Constitution (J.A. 11-14, 15-18).[7] Respondents prayed that the district court enjoin any further culling from voter registration records of the names of persons seeking bilingual election materials, any disclosure of such information as has already been collected, and any questioning of such foreign-born persons. They also sought a declaration that these investigative activities are unlawful, and an award of monetary relief (J.A. 18-21).

Infante and Juan D. Martinez—as named parties-plaintiff. See J.A. 77-98. But the district court denied the motion to amend. See Pet. App. 76a. The court of appeals thus treated the case as if Jose Olagues was the only individual party-plaintiff. See *id.* at 2a, 5a, 11a-12a. Accordingly, in this brief, we refer to the first amended complaint as the complaint upon which this action was based. The arguments advanced herein are, however, equally applicable to the parties and allegations set forth in the second amended complaint.

[7] Specifically, respondents alleged that "Russoniello initiated a secret probe of Hispanic-American and Chinese-American voters by sending a letter to nine Bay Area District Attorneys" (J.A. 11 (emphasis omitted)); that "[s]uch an investigation * * * was not based on any reasonable suspicion that foreign born voters were committing fraud nor that the problem of voter irregularities was limited only to persons of Hispanic-American or Chinese-American descent" (J.A. 12); and that respondents had been "arbitrarily discriminated against" on the basis of their race and national origin, deprived of their "right of association and right to refuse to answer question[s] as to political activity," and "effectively intimidate[d], threaten[ed] and coerce[d]" in their registration and associational activities (J.A. 13).

In support of their claims, respondents filed affidavits concerning the adverse effects that the investigation allegedly had had and would continue to have on them. Respondent Olagues expressed his "fear" that he would "soon be contacted by local law enforcement agencies to prove my citizenship or to determine if I have been contacted by registrars of voters or special interest groups," and stated that he was "deeply troubled over the fact that I, as well as other United States Citizens, will become targets of investigations for exercising our legal right to bilingual voter information" (J.A. 45-46). Officials associated with the organizational respondents submitted declarations concerning the effects of the investigation on their efforts, stating that they had "experienced a noticeable decrease in the number of volunteers who have helped register voters" in the weeks since the investigation was initiated (J.A. 30), that the "fear instilled by the potential of such inquiries has had a chilling effect upon the activities of the [organizations] and the fulfillment of [their] objectives" (J.A. 32), and that Russoniello continued to pursue the investigation notwithstanding a request that it be terminated (J.A. 37).[8]

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[8] Representatives of other voter registration organizations, although not party to the lawsuit, also submitted affidavits concerning their perception of the effect that this investigation was having on Hispanic-Americans and Chinese-Americans. See J.A. 38-41 (Declaration of Luanne Lash); J.A. 54-56 (Declaration of Lydia Gonzalez); J.A. 75-76 (Declaration of Maria Virginia Salmon); see also J.A. 60-61 (Declaration of Rudolph G. Rodriguez). Also, several individuals whose names had been selected for investigation stated that the "investigation is unfair since [the government officials] had no reason to ever believe that [we are] illegally registered to vote" (J.A. 223 (Declaration of Lilia Isabel Medina)) and that they were "very upset and bothered" that "a secret investigation was going on about [their] qualifications to vote" (J.A. 227 (Declaration of Maria Gloria Rodriguez)). In addition, one individual who feared that his name might be selected for investigation stated that he did "not think that any citizen should have to answer any

On the government's motion, the district court, on May 24, 1982, dismissed respondents' prayer for injunctive relief, holding that it had "no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office" (Pet. App. 96a). Then, on December 15, 1982, in ruling on cross-motions for summary judgment, the court dismissed the remainder of respondents' suit (*id.* at 81a). In an opinion filed later, the court noted that nothing in the record suggested that the voter interviews involved involuntary interrogation or that any individual was penalized in any way for refusing to cooperate (*id.* at 80a-81a). It also observed that the information provided by the local defendants and the INS was a matter of public record (*id.* at 84a) and that, given the evidence of possible fraud, "the United States Attorney ha[d] the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, instigate required remedial action" (*id.* at 85a-87a). Accordingly, it held that defendants' action did not violate any clearly established right of the plaintiffs (*id.* at 88a), and that all defendants, including petitioners, were entitled to qualified immunity and summary judgment (*id.* at 95a).

3. A divided panel of the Ninth Circuit affirmed (Pet. App. 41a-75a). It first ruled that the termination of the investigation did not render the controversy moot, as to the claims for either monetary or equitable relief (*id.* at 44a-47a), and that the organizational respondents had standing to seek both types of relief, while the individual respondent had standing only to seek damages (*id.* at 47a-

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questions of the District Attorney[] simply because [he] didn't ask for a ballot in English" (J.A. 49 (Declaration of Luis Diaz-Infante)). Finally, the two individuals that respondents unsuccessfully attempted to add as parties-plaintiff stated, respectively that they did not "want to be bothered" (J.A. 52 (Declaration of Evelia Diaz-Infante)) and that they were "very upset at [their] local officials that are cooperating with an investigation that * * * only serves to discourage people from registering to vote, voting, and registering other voters" (J.A. 58 (Declaration of Juan D. Martinez)).

54a). The court found that the individual's allegation that the investigation had a "chilling effect" on him did not present a "justiciable claim" (*id.* at 49a), and that any "stigma" he suffered from "public disclosure that the investigation was taking place * * * apparently was self-induced by the filing of this lawsuit" (*id.* at 50a). By contrast, it found that the organizational respondents had standing to challenge the investigation because "their voter registration and educational efforts have been hindered as the direct result of the challenged investigation" (*id.* at 51a), and "they are undoubtedly the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register" (*id.* at 52a).

The court then held that none of the respondents were entitled to the equitable or monetary relief they sought (Pet. App. 54a-69a). While rejecting the district court's conclusion that it lacked jurisdiction to enjoin or otherwise control the investigation (*id.* at 54a), the court held that, in view of the "difficult problems of separation of powers' " (*id.* at 55a, quoting *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978)), presented by the criminal investigative process, an action to enjoin such investigative activities should be entertained "only in extraordinary circumstances" (Pet. App. 55a). Stating that "a United States Attorney is entitled, indeed required," to pursue allegations of vote fraud (*id.* at 61a), and that the present investigation was "reasonably limited in both its scope and its use of classifications" (*ibid.*), the court found no such extraordinary circumstances suggested by the record in this case (*id.* at 55a). For the same reasons, the court also upheld the district court's denial of declaratory relief (*id.* at 64a). Finally, it determined that the investigation did "not violate any 'clearly established' rights" (*id.* at 68a-69a), so that "all those sued were entitled at least to qualified, good faith immunity" from liability for damages (*id.* at 68a).[9]

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[9] Judge Nelson dissented (Pet. App. 69a-75a). She agreed with the majority that the organizations had standing and that the

4. On petition for rehearing, the court vacated the panel decision and, by a six to five vote, reversed and remanded the case to the district court (Pet. App. 1a-38a). Like the panel, the en banc majority found that defendants were entitled to immunity from monetary liability (*id.* at 23a-24a), and that the termination of the investigation for lack of prosecutorial merit did not moot respondents' prayers for injunctive and declaratory relief, because there was "a possibility of continuing adverse effects" (*id.* at 6a-10a).[10] In any event, the court held that the issues raised by this case are "capable of repetition yet evading review" (*id.* at 9a). It noted that voter registration investigations, such as the one conducted in the present case, may be of short duration, and that, "[b]ecause Russoniello is authorized to investigate election fraud and has the means to repeat a similar bilingual voter registration investigation, it is reasonable

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defendants were entitled to good faith immunity from damages (*id.* at 69a). Unlike the majority, however, she concluded that the individual respondent had standing, that extraordinary circumstances are not required to enjoin an investigation that infringes upon First Amendment rights, and that declaratory and injunctive relief should not be judged under the same standards (*id.* at 69a-70a). Judge Nelson argued that a district court always has equitable authority to enjoin an investigation that lacks a "reasonable basis" (*id.* at 71a-72a), and to issue declaratory relief concerning any unconstitutional action by a government official (*id.* at 72a-73a). Accordingly, she said that an investigation should be enjoined "if it lacks a reasonable basis or was initiated in bad faith" (*id.* at 71a) and that this investigation should, in any event, be declared unconstitutional under the Equal Protection Clause given the insufficient justification for its utilization of a suspect classification (*id.* at 75a).

[10] The court reasoned that "the termination of Russoniello's investigation is not irrevocable" (Pet. App. 7a), that these individuals "are understandably insecure in exercising their recently acquired rights as citizens, and easily intimidated by government action" (*ibid.*), and that, "[t]herefore, unless * * * the legality of [the] investigation [is determined] * * *, the [o]rganizations' registration drives may continue to suffer from the chilling effects of the investigation despite its termination" (*id.* at 7a-8a).

to believe that the [respondents] could be the targets of a similar investigation in the future" (*ibid.*). Like the panel, the en banc majority further determined that the organizational respondents had standing to seek equitable relief (*id.* at 12a-15a), but, unlike the panel, also found that respondent Olagues had standing to seek such relief (*id.* at 11a-12a). The majority reasoned that respondent Olagues "was stigmatized as a person who might have registered to vote illegally" (*id.* at 11a) and that "the Government required [him] to prove his citizenship, an affirmative obligation the Government did not place on people who request[ed] English language ballots" (*id.* at 12a).

The en banc majority then determined that the district court had jurisdiction to enjoin or declare unlawful the investigation and remanded the case for determination whether an injunction and/or a declaratory judgment should issue (Pet. App. 15a).[11] Examining the merits of respondents' claims as a guide for the district court on remand, the court declared that "the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involve[d] a suspect classification" (*id.* at 19a), may have burdened respondents' "fundamental right" to vote (*id.* at 20a), and may have "interfered with their constitutional right of association and political expression" (*id.* at 22a (footnote omitted)).[12] The court thus remanded with instructions that the district court determine whether the investigation conducted was "the least drastic means of

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[11] The court noted that the district court erred in "appl[ying] the good faith immunity standard * * * to * * * bar[] [all] equitable relief" (Pet. App. 16a n.8).

[12] At the same time, the en banc majority determined that there was "no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote" (Pet. App. 21a (footnote omitted)) and thus upheld "the district court[s] * * * [grant of] summary judgment on the Voting Rights Act claims" (*id.* at 22a).

achieving [the] governmental interest" in preventing voter registration fraud (*id.* at 19a), whether respondents' right to vote was unduly burdened (*id.* at 20a), and whether respondents' First Amendment interests outweighed the government's interest in preventing voter registration fraud (*id.* at 23a).

Judge Wallace, joined by Judges Sneed, Alarcon and Beezer, dissented (Pet. App. 25a-36a). Judge Wallace argued that respondent Olagues lacked standing to seek equitable relief, reasoning that there would be no reason to investigate again the voter registration of a person found to be a citizen and that, in any event, the effect of any such investigation upon him would be de minimis (*id.* at 29a). He further argued that the majority had failed "to respect the special limitations on our power to enjoin criminal investigations by the executive branch" (*ibid.*). While suggesting that "the separation of powers principle may not mandate judicial inaction in a case where the executive outrageously oversteps the limitations on prosecutorial power" (*id.* at 30a), Judge Wallace found "nothing egregious about the prosecutorial conduct in this case" (*id.* at 31a). He stated that the United States Attorney had focused his investigation on recently-registered, foreign born voters requesting bilingual ballots only "to narrow his inquiries to those persons who may have [had] knowledge of serious criminal activity" (*id.* at 33a); that any burden created by the investigation was "a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct" (*id.* at 36a); and that neither the review of public records nor the follow-up questioning of potential witnesses "involve[d] any violation of first amendment rights" (*ibid.*). Accordingly, Judge Wallace concluded that the requirements for equitable relief against a prosecutorial investigation were not met in this case (*id.* at 31a).[13]

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[13] Judge Wallace rejected the proposition that the language based classifications used in the investigation should be subjected to strict scrutiny, but concluded, in any event, that the need for them was sufficiently compelling to survive that test (Pet. App. 31a).

Judge Sneed filed a separate opinion concurring in Judge Wallace's dissent (Pet. App. 37a-38a). Judge Hug filed a separate dissent arguing that the case was moot (*id.* at 36a-37a).

SUMMARY OF THE ARGUMENT

I. This case is now moot. The voter registration fraud investigation giving rise to this litigation ended approximately five years ago, and there is no reasonable expectation that it will be reopened. The United States Attorney initiated the investigation in response to unique conditions that no longer exist and terminated it precisely because it failed to produce evidence justifying further action. There are no continuing adverse effects suggesting a controversy as to whether injunctive or declaratory relief might issue. Nor does this case fit within the "capable of repetition, yet evading review" exception to ordinary Article III mootness principles. There is nothing peculiarly short-lived about governmental action directed against voter fraud and, to whatever extent an investigation leads to the filing of criminal charges, objections to government conduct can be raised in that proceeding. In any event, respondents have not made a reasonable showing that they are likely to be subjected again to the allegedly illegal activity that they challenge in this case.

II. Assuming, arguendo, that this lawsuit is not moot, it is nevertheless "nonjusticiable" under Article III of the Constitution. At least in the absence of legislation creating legal rights and standards by which the Executive is to be limited in its investigation of criminal cases, review of a prosecutor's preliminary conduct is not a proper subject for the exercise of the "judicial Power." Pre-indictment decisions concerning whether, when, and how to investigate potential criminal activity are an integral part of the prosecutorial power and, in general, should not be subjected to judicial review until the Executive Branch engages in coercive or publicly accusatory activity. Internal, deliberative activities of the Executive

Branch are neither "final" nor "authoritative" and thus lack the focus necessary for limited judicial review. Furthermore, the internal, deliberative activities of the Executive Branch are inherently preliminary and ambiguous, and thus are not subject to judicially manageable standards.

The voter fraud investigation challenged in this case did not involve the sort of coercive or publicly accusatory activity essential to a judicially cognizable controversy. It included the search of public records for information concerning recent voter registrants; the circulation of that information among various government officials; and voluntary, noncustodial interviews of various individuals whom were believed to have information about possible criminal activity. None of these activities is an appropriate predicate for the exercise of the "judicial Power."

III. Assuming, arguendo, that the separation of powers between the Executive and Judicial Branches in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive activities of a United States Attorney, it is nevertheless true that injunctive and declaratory relief cannot issue here. Settled principles of equity jurisprudence provide that state law enforcement activities may be enjoined or declared unconstitutional only in "extraordinary circumstances." No lesser restriction on the judiciary's equitable powers should apply where federal criminal investigative activities are in issue. No such "extraordinary circumstances" exist in this case.

Respondents have not alleged sufficient injuries to provide themselves with standing to seek equitable relief, much less the "great and immediate" irreparable injury necessary to justify the granting of equitable relief. Respondents are unable to establish a reasonable likelihood that they will again be subjected to the activities about which they complain. In any event, the harms they allege can be adequately remedied through the defense of any prosecution that might result or by an action for money damages.

Nor were the circumstances extraordinary in the sense that they involved governmental action conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The government possessed information indicating that various persons or organizations may have been conspiring fraudulently to register unqualified voters. It was proper, and perhaps obligatory, that an investigation be conducted. That the ensuing investigation in some sense focused on persons of Chinese-American and Hispanic-American descent is neither alarming nor problematic. Law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. The United States Attorney's focus on the registrants' foreign birth, recent registration, and request for bilingual ballots reflects just such an effort to identify those persons who were most likely to possess information about the problem he was investigating. Accordingly, the court below should not have remanded this case for further proceedings with respect to the prayers for equitable relief.

ARGUMENT

I. THE TERMINATION OF THIS VOTER REGISTRATION FRAUD INVESTIGATION FOR LACK OF PROSECUTORIAL MERIT MOOTS RESPONDENTS' PRAYERS FOR INJUNCTIVE AND DECLARATORY RELIEF

A. The court of appeals remanded this case for trial on the issue of whether injunctive or declaratory relief should be granted against the conduct of a criminal investigation which ended several years ago. This Court has long said that a lawsuit is "moot when the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome" (*Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)). Issues are no longer "live" when the conduct giving rise to them has

ceased and " 'there is no reasonable expectation * * *' that the alleged violation will recur" (*County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Parties lack a legally cognizable interest in a lawsuit's outcome when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (*County of Los Angeles* v. *Davis*, 440 U.S. at 631). See also *Defunis* v. *Odegaard*, 416 U.S. 312, 316-319 (1974). These conditions are satisfied here.

As respondents concede (Br. in Opp. 5, 22), all of the conduct at which the lawsuit was directed—the culling of names of persons requesting bilingual election materials from voter registration files, the circulation of those names among Russoniello, the INS, and certain local government officials, and the plan to question a subset of persons requesting bilingual ballots concerning the circumstances under which they had been encouraged to register—came to an end in 1982 when the investigation was terminated. See Pet. App. 5a, 7a-8a, 27a, 44a, 80a-81a; J.A. 113-114, 155-156, 180-181, 183-184, 187-190. There is no reason to suppose that it will be reopened.[14]

The investigation was tailored to the unique conditions confronted in March and April 1982. At that time, available information indicated that a substantial number of foreign-born persons had recently registered to vote, that those persons may have been misled about their

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[14] The court below erred in suggesting (Pet. App. 7a) that this case is not moot because "the termination of Russoniello's investigation [was] not irrevocable." This Court has never suggested that a case is moot only where there is no possibility that the challenged conduct will recur. That a slight possibility exists that the challenged conduct could recur at some unspecified time in the future "is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court" (*O'Shea* v. *Littleton*, 414 U.S. 488, 498 (1974)). See also *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969). There must be a "reasonable likelihood" that the conduct will recur. See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983).

eligibility to vote, and that, if the improper registrations were widespread, the imminent June 8, 1982 elections could be subject to challenge. Given the time constraints involved, the officials made only a preliminary inquiry into the problem, using criteria calculated to give a representative insight into the breadth and nature of any voter registration fraud. Moreover, they terminated that preliminary inquiry when "it failed to produce evidence supporting any further investigative efforts" (Pet. App. 8a) and, over the intervening five years, they have not used the data gathered in 1982 in any such voter registration fraud investigation, even though federal elections were held in 1984 and 1986. See J.A. 102, 113-114, 155-156, 180-181, 183-184, 187-190. In these circumstances, it is clear that there is "no reasonable likelihood" that the challenged conduct will recur. See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983) (where defendant has publicly announced its decision to cease and desist from challenged conduct and not to return to it, that conduct cannot reasonably be expected to recur); *County of Los Angeles* v. *Davis*, 440 U.S. at 631-632 (where procedure used only once and in response to a unique set of conditions, challenged conduct cannot reasonably be expected to recur).[15]

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[15] There is no basis in this case for suggesting that Russoniello and the other government officials terminated the investigation simply to moot the lawsuit. Cf. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 & n.5 (1953) (citation omitted) (prayers for injunctive and declaratory relief cannot be mooted by " 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption' "). Russoniello actually refused requests by respondents and others to terminate the investigation. See J.A. 37, 219-220. Moreover, he continued the investigation for four months after the filing of the lawsuit and terminated it only upon determining that it had produced no evidence upon which further investigatory or prosecutorial action could be based. See Pet. App. 8a; J.A. 180-181. Furthermore, in the five years since the investigation was terminated, neither Russoniello nor any other official has shown any interest in

Nor are there any substantial continuing effects from the past investigation sufficient to sustain a finding of a live controversy with respect to the injunctive and declaratory relief requested in this case. Respondents allegedly suffered injury from the manner in which petitioners and other officials gathered and used information about the requests of foreign-born registrants for bilingual election materials. But any injuries allegedly suffered by respondents as a result of these investigative activities were properly the subject of respondents' prayer for monetary relief, and there can be no reasonable claim of continuing injury—justifying equitable relief—from conduct which ended approximately five years ago. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-109 & nn. 7-8, 111 (1983) (no case or controversy with respect to injunctive or declaratory relief unless there is "a real and immediate threat of future injury by the defendant"); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.").[16]

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reviving it; rather, they have announced to the courts, the respondents, and the public that this particular investigation has ended. See J.A. 102, 114, 155-156, 180-181, 184, 188, 190.

[16] That the government officials in this case had an immunity from damages (because they acted in objective "good faith") does not change this result. See *Ashcroft* v. *Mattis*, 431 U.S. 171, 171-172 (1977) (per curiam). Nor can this conclusion be avoided on the ground suggested by the court below (Pet. App. 7a-8a) that because recently-registered, foreign-born persons are "easily intimidated by government action," and thus may continue to be afraid to vote or request bilingual ballots, there are continuing adverse effects sufficient to satisfy the "case" or "controversy" requirement. As this Court has said, "[i]t is the *reality* of the threat of repeated injury * * *, not the [respondents'] subjective apprehensions" concerning such future injury, that is relevant (*City of Los Angeles* v. *Lyons*, 461 U.S. at 107 n.8 (emphasis in original)).

B. Nor does this investigation fit within the "capable of repetition, yet evad[ing] review" exception to ordinary Article III mootness principles. That doctrine applies "only in exceptional situations" (*City of Los Angeles* v. *Lyons*, 461 U.S. at 109), specifically, where (1) the challenged action is "by nature short-lived" (*Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976)), and where (2) there is a "reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Accord, *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979). Neither condition is satisfied here.

There is nothing peculiarly short-lived about governmental action aimed at identifying, rooting out, and possibly punishing conduct involving voter registration fraud, such as would suggest that those activities will evade effective judicial review. Compare *Defunis* v. *Odegaard*, 416 U.S. at 319 (law school admission practices will not by their nature evade effective review), with *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 546-547 (pre-trial publicity restraints by their nature will evade effective review); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (restrictions on means for aborting pregnancy by their nature will evade effective review). Like other types of criminal investigations, those concerning vote fraud may be either long or short and, indeed, as they often require extensive data-gathering, will often be quite lengthy. Of course, some such investigations carry a special urgency, imposed by circumstances such as the impending election that was a matter of substantial concern in this case. Even in instances where the investigation is short, however, affected parties will be provided with a forum in which to raise any objections they may have to the motivation or manner of the investigation where the government ultimately takes legal action. Only where the investigation culminates in a decision to take no action, either

criminal or civil—thus vindicating those under scrutiny—is a suspect or other affected party in any sense likely to be without a forum in which to air his or her grievances. Even then, however, to the extent such matters present a justiciable controversy, these investigative activities may be challenged in an action for damages. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 109.

In any event, respondents have also made no reasonable showing that they are likely to be subjected again to investigative action like that challenged in this case. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 109; *Murphy* v. *Hunt*, 455 U.S. at 482-483. The government now knows that respondent Olagues is a legally registered citizen and will obviously not investigate him again as a possible non-citizen voter. More generally, the unique conditions that brought about this investigation no longer exist, and it is unrealistic to suppose that the government would reinstitute any similar investigation—especially since this one was terminated precisely because it failed to produce evidence meriting further inquiry. Cf. *City of Los Angeles* v. *Davis*, 440 U.S. at 632; *County of Los Angeles* v. *Lyons*, 461 U.S. at 109. Indeed, as respondents themselves note (Br. in Opp. 11-12), California has since amended its law to provide that "information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots * * * or other data that would reveal the identity of the requester, shall not be deemed to be public" (Cal. Gov't Code § 6253.6 (West Supp. 1987) (underscoring omitted)), and it thus appears that government officials could not collect voter registration information in the same way as they did here, even if they wanted to do so.[17] Hence,

[17] In fact, the California Constitution has recently been amended to require public officials to "insure that the role of English as the common language of the State of California is preserved and enhanced" (Cal. Const. Art. III, § 6). Thus, as respondents note (Br. in Opp. 12-13 n.8), it may be the case that bilingual ballots will not be available in the future, thus rendering impossible the sort of inquiry undertaken here.

there can be no "reasonable expectation that the same complaining part[ies] [will] be subjected to the same action again" (*Weinstein* v. *Bradford*, 423 U.S. at 149).

C. In short, this case is moot under both ordinary mootness principles and the "capable of repetition, yet evading review" exception. The appropriate disposition, therefore, is to vacate the judgment of the court below and to remand with instructions that the district court be directed to dismiss the prayers for injunctive and declaratory relief. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

II. THE JUDICIARY EXCEEDS ITS CONSTITUTIONAL AUTHORITY UNDER ARTICLE III WHEN, IN THE ABSENCE OF LEGISLATION CREATING A CAUSE OF ACTION AND ENUNCIATING STANDARDS BY WHICH THE GOVERNMENT'S CONDUCT IS TO BE JUDGED, IT ENTERTAINS A PRE-INDICTMENT CHALLENGE TO THE NONCOERCIVE INVESTIGATIVE ACTIVITIES OF A UNITED STATES ATTORNEY

In any event, this lawsuit is "nonjusticiable" under Article III of the Constitution, which limits the federal courts to the exercise of "judicial Power." At least in the absence of legislation imposing restrictions and creating rights of action concerning the way in which the Executive performs its criminal investigative functions, the prosecutorial power, which necessarily encompasses pre-indictment decisions concerning whether, when, and how to investigate possible criminal activity, is committed to the Executive Branch. Actions which are themselves coercive in nature, impinging in a direct way on existing legal rights, are generally subject to judicial challenge as the means of redeeming those rights. But until the Executive Branch engages in such coercive activity, its actions are not of a form appropriate for judicial review. Internal, deliberative activities of the Executive Branch are neither final nor authoritative and thus do not provide an appro-

priate focus for review by courts of limited jurisdiction. Nor, in the absence of legislation creating a right of action to enforce specific rules concerning the performance of such noncoercive deliberative actions, are there judicially manageable standards by which courts could review them. Allowing judicial review in these circumstances would, therefore, short-circuit the criminal investigative process and impose an inappropriate task on the judiciary.

A. Article III Of The Constitution Respects The Separation Of Powers Between The Executive And Judicial Branches

The Constitution is structured to give each Branch of government specified powers in relation to the other Branches. See The Federalist No. 51, at 320 (J. Madison). It ensures that each Branch is confined by a set of "checks" and "balances" to its respective authority. See *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 6-7; *Buckley* v. *Valeo*, 424 U.S. 1, 120-124 (1976) (per curiam); *INS* v. *Chadha*, 462 U.S. 919, 960-963 (1983) (Powell, J., concurring in the judgment); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); The Federalist No. 47, at 325 (J. Madison) (C. Rossiter ed. 1961). The separation of powers also ensures that the involvement of one Branch in the affairs of another Branch is limited and carefully defined. See *Allen* v. *Wright*, 468 U.S. 737, 750-752 (1984); *Northern Pipe Line Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 57-62 (1982) (plurality opinion); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629-631 (1935); *O'Donoghue* v. *United States*, 289 U.S. 516, 530-534 (1933). Article III of the Constitution embodies and implements both aspects of this separation of powers.

Article III does not grant the federal courts "an unconditioned authority to determine the constitutionality of legislative or executive acts" (*Valley Forge Christian*

College v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). Rather, Article III limits the courts to the exercise of "judicial Power" in "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. The terms "judicial Power" and "Cases and Controversies" reflect historical practices that have long limited courts to a role that is " 'strictly judicial in its character' " (*Muskrat* v. *United States*, 219 U.S. 346, 355 (1911), quoting *Gordon* v. *United States*, 117 U.S. 697, 706 (1864)). See also 2 *The Records of the Federal Convention of 1787*, at 430 (M. Farrand ed. 1966). Under these historic practices, federal courts have been confined to "a role consistent with a system of separated powers and [to disputes] which are traditionally thought to be capable of resolution through the judicial process" (*Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)).

This Court has developed various doctrines to explain the circumstances in which "Cases" or "Controversies" may be said to have "assume[d] such a form that the judicial power is capable of acting on [them]" (*Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 819 (1824)). See generally *Flast* v. *Cohen*, 392 U.S. at 97. Through "standing" doctrine, for example, the Court has instructed that the authority of federal courts may be invoked only to address distinctly personal grievances, and not to address " 'generalized grievances about the conduct of government or the allocation of power in the Federal System' " (*United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (citation omitted)). See also *Allen* v. *Wright*, 468 U.S. at 753-756; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Likewise, through "mootness" doctrine, the Court has taught that federal courts may intervene only to resolve actual disputes and may not render advisory decisions concerning questions of abstract interest. See *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987), slip op. 3-4; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Furthermore, through "ripeness" doctrine, the

Court has admonished that federal courts may address only "final and authoritative" governmental actions (*MacDonald, Sommer & Frates* v. *County of Yolo*, No. 84-2015 (June 25, 1986), slip op. 7); federal courts must, this Court has said, avoid "entangl[ement] * * * in abstract disagreements over administrative policies" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967)). And, finally, through "political question" and similar doctrines, the Court has made clear that some issues lack judicially manageable standards and thus must be held to "lie[] beyond judicial cognizance" altogether (*Baker* v. *Carr*, 369 U.S. 186, 211 (1962)). See *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *Coleman* v. *Miller*, 307 U.S. 433 (1939). See also *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959).

These doctrines of "'standing[,] * * * mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government'" (*Allen* v. *Wright*, 468 U.S. at 750, quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1982) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)). These doctrines recognize that certain questions about the structure and operation of government are beyond the "judicial Power" (*Powell* v. *McCormack*, 395 U.S. 486, 516-549 (1969)), and that "'[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either'" (*Valley Forge Christian College* v. *Americans United for Separation of Church & States, Inc.*, 454 U.S. at 473-474) (citation omitted)). They therefore join together to "define[] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and to state "fundamental limits on [the] federal judicial power in our sys-

tem of government" (*Allen* v. *Wright*, 468 U.S. at 750). See generally *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) (these doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society").

B. Absent Legislation Creating Judicially Enforceable Rights And Providing Applicable Standards, The Judicial Branch Exceeds Its Constitutional Authority When It Supervises Or Reviews The Noncoercive Information-Gathering And Deliberative Activities Of The Executive Branch

The authority of the judicial branch to oversee the activities of the coordinate branches is thus limited by a constellation of doctrines to situations where a question amenable to legal analysis has been focused in a concrete manner by a specific controversy between interested parties. At least in the absence of legislation creating judicially enforceable rights and providing applicable standards concerning the prosecutor's performance of his investigative functions, we submit that these requirements of justiciability are not met where a criminal investigation has not yet taken the form of coercive or publicly accusatory action.

1. Article II of the Constitution vests the Executive, not the Judiciary, with the exclusive authority to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. This delegation has long been held to include the power to prosecute—*i.e.*, the authority to decide whether, when, and in what sort of cases to charge a violation of the laws of the United States. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979) ("[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion"); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted) (assuming probable cause, decision whether and what to charge "rests entirely in [the prosecutor's] discretion"); *United*

States v. *Nixon*, 418 U.S. 683, 693 (1974) (the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *United States* v. *Thompson*, 251 U.S. 407 (1920) (court order quashing indictment for failure to obtain permission of court to resubmit to grand jury invades functions of the United States Attorney and the grand jury); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868) ("[p]ublic prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney").

The textual responsibility to see that the laws are faithfully executed requires the Executive Branch to "obtain[ ], review[ ], and evaluat[e] * * * evidence" (*Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976)). See *Community for Creative Non-Violence* v. *Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, [like the power to decide] when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws."); *Nathan* v. *Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) ("the principle of Executive control extends to all phases of the prosecutorial process"). Indeed, the responsible exercise of the power to prosecute presumes that an investigation will precede the filing of charges. See *United States* v. *Goodwin*, 457 U.S. 368, 382 n.14 (1982) ("a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case"); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) ("the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. * * * [T]he right to make the decision * * * must include some limited right to gather necessary information"). Accordingly, the lower federal courts have routinely rejected the notion that the courts may exercise general supervision over the investigative activities of the Executive Branch. See *Reporters Committee for*

Freedom of the Press v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Socialist Workers Party* v. *Attorney General*, 510 F.2d 253, 255 (2d Cir. 1974) (per curiam), motion for stay denied, 419 U.S. 1314 (1974) (Marshall, J.); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983); see also *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978).

2. This is not to suggest that the performance of investigative or prosecutorial activities by the Executive Branch is in all instances immune from judicial review. It may well be within the power of Congress to impose substantive limitations on the means used by the Executive Branch in its enforcement of legislatively enacted criminal provisions and, in doing so, to provide for judicial enforcement. In the absence of such congressional action, however, judicial review is appropriate only at such time as the Executive Branch engages in concrete and coercive action.

Once a prosecution has been formally initiated, either by the filing of an information or by the return of an indictment, an aggrieved individual is clearly entitled to challenge his or her prosecution on a variety of constitutional or procedural grounds, including the motivations of the prosecutor in bringing it. See *Wayte* v. *United States*, 470 U.S. 598, 608 (1985); *Bordenkircher* v. *Hayes*, 434 U.S. at 364; *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974). Moreover, even prior to the bringing of charges, certain exercises of governmental power may be subjected to judicial review. A federal court may, for example, review claims that the Executive Branch has committed an unreasonable "search" or "seizure" (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), or has attempted to subpoena material in violation of the First or Fourth Amendments (see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946); cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708 (1972) (prosecutor may not use grand jury and its subpoena powers as instrument of oppression)).

Review and supervision of information-gathering and deliberation within the Executive Branch—in the absence of coercive action or legislatively created rights and standards of review—is not, however, an appropriate exercise of judicial authority. See *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972); *Heckler* v. *Chaney*, 470 U.S. 821, 831-834 (1985). At issue is Executive Branch action that has not come to fruition, whose justifications are still being explored and whose consequences are only vaguely perceivable. And, as this Court has made clear in analogous contexts, when the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect" (*id.* at 832 (emphasis in original)).

In *Laird* v. *Tatum*, 408 U.S. 1 (1972), for example, the Court faced the question "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" (408 U.S. at 10). The Court answered this question in the negative, reasoning that the investigative and data-gathering activities of the Department of Army at issue there were not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11) and, accordingly, that the private citizen-plaintiffs were not entitled " 'to invoke the judicial power to determine the validity of [such] executive * * * action' " (*id.* at 13, quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). Otherwise, the Court concluded, "the federal courts [would be] virtually continuing monitors of the wisdom and soundness of Executive action" (408 U.S. at 15).

Similarly, in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), the Court applied the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.* (APA), in finding

no "final agency action" subject to judicial review in the Federal Trade Commission's issuance of a complaint that it had "reason to believe" that several major oil companies were violating Section 5 of the Federal Trade Commission Act. The Court reasoned that "the Commission's averment of 'reason to believe' * * * [was] not a definitive statement of position" (449 U.S. at 241), but rather "a threshold determination that further inquiry is warranted" (*ibid.*), and that, since this determination has no "legal or practical effect" except to impose a "burden of responding to the charges made against it" (*id.* at 242), judicial review would be premature, an "interference with the proper functioning of the agency[,] and a burden for the courts" (*ibid.*).

3. The concerns articulated in *Laird* and *Standard Oil*, justifying the conclusion that a "final" and "authoritative" decision must be made before judicial review may occur under either the Constitution or the APA, strongly suggest that judicial review in the present case is likewise premature. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes" (*MacDonald, Sommer & Frates* v. *County of Yolo*, slip op. 7). It cannot judge whether government has unnecessarily chilled First Amendment activity when government itself has not engaged in a definitive act. The court would need information that is beyond its reach (because it has yet to be gathered by the Executive Branch)—such as the extent of the problem to be addressed, the cause of the problem, the alternative means for resolving that problem, and the viability of those alternatives. See *Laird* v. *Tatum*, 408 U.S. at 11, 13-15. Likewise, a court cannot judge whether government has engaged in unconstitutional "selective prosecution" until alleged law offenders are actually being prosecuted in the first instance. Again, the court would need information that is beyond its reach (because it has yet to be gathered by the Executive Branch)—such as the identity and composition of the entire group of law

offenders, the circumstances of each offender's violation, and the bars to prosecution of particular offenders (as viewed by the Executive Branch). See *Wayte* v. *United States*, 470 U.S. at 609-610; *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). The courts need a final determination by the Executive Branch, thus committing it to action, to provide the "focus for judicial review" (*Heckler* v. *Chaney*, 470 U.S. at 832).

The concerns articulated in *Laird* and *Standard Oil* also relate to the absence of judicially discoverable and manageable standards for reviewing the manner and scope of noncoercive deliberative activities of the Executive Branch. See *Wayte* v. *United States*, 470 U.S. at 608; *Heckler* v. *Chaney*, 470 U.S. at 830-832; see generally *Baker* v. *Carr*, 369 U.S. at 226. The data-gathering and deliberative aspects of government investigations are preliminary and are often initiated in response to tips, rumors, and other information that is often unreliable and may, upon investigation, turn out to be false. On that account, they are necessarily fluid and unstructurable, evolving according to the information that they uncover. See *United States* v. *Goodwin*, 457 U.S. 368, 380-382 & n.14 (1982). Their scope, intensity, and duration varies with the resources that the Executive Branch has available to devote to them. And the availability of such resources varies with the Executive Branch's overall agenda, the likelihood that the investigation will uncover prosecutable crimes, and the state of current funding by Congress. There are no accessible principles indicating how the Executive Branch should respond to this array of considerations. Accordingly, this Court has said that the question of how the government should proceed in view of all of these factors is "not readily susceptible to the kind of analysis the courts are competent to undertake" (*Wayte* v. *United States*, 470 U.S. 598, 607 (1985)).

Taken together, these concerns indicate that subjecting noncoercive data-gathering and deliberative activi-

ties to judicial scrutiny will spell great mischief for the orderly administration of law by both the Executive and Judicial Branches. Persons likely to be investigated or prosecuted have an overwhelming incentive to short-circuit the processes by which information is gathered concerning their criminal activity, and authorizing judicial review of preliminary data-gathering activities would create a powerful tool toward that end.[18] Through such litigation, such persons could divert both courts' and prosecutors' "energy and attention * * * from the pressing duty of enforcing the criminal law" (*Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976)), deny prosecutors the opportunity to correct their own mistakes (*FTC* v. *Standard Oil Co.*, 449 U.S. at 243), and "delay[] the criminal proceeding" (*Wayte* v. *United States*, 470 U.S. at 607). Prosecutors would thus be given an incentive to avoid these problems by foregoing investigations of particularly obstreperous litigants, by resorting to the grand jury to investigate possible criminal activity (rather than use the less expensive and perhaps less intrusive means available to prosecutors' offices),[19] or, if necessary, by

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[18] Litigants might also try to use such litigation to discover the identity of, and thus to intimidate, the Executive Branch's informants. The Court has noted a similar concern in its grand jury cases. See *United States* v. *Sells Engineering Inc.*, 463 U.S. 418, 424 (1983). See generally *Roviaro* v. *United States*, 353 U.S. 53 (1957) (discussing informants' privilege).

[19] A grand jury, of course, has "wide latitude to inquire into violations of criminal law" and to "determine alone the course of its inquiry" (*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)). Grand jurors "may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge" (*United States* v. *Dionisio*, 410 U.S. 1, 15 (1973)), and "a sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received" (*id.* at 15-16). See also *Costello* v. *United States*, 350 U.S. 359, 362, (1956). Importantly, the Court has held that the federal courts are without authority to review the competency, relevancy, or constitutionality of the evidence that a grand jury considers (see *United States* v. *Calandra*, 414 U.S. at 344-345, 353-355), to assess the basis upon which a grand jury has

pursuing prosecutions without having fully investigated all circumstances surrounding a case. See generally *United States* v. *Goodwin*, 457 U.S. at 381-382 & n.14; *Butz* v. *Economou*, 438 U.S. 478, 509-517 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 792-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. at 424-431. The avoidance of these unfortunate consequences is yet another reason that the "judicial Power" should not be construed to authorize review of noncoercive Executive Branch activities.

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initiated an investigation (see *United States* v. *Dionisio*, 410 U.S. at 13-17), or to "set limits to the investigation that the grand jury may conduct" (*Blair* v. *United States*, 250 U.S. 273, 282 (1919)). Rather, only the coercive aspects of a grand jury's investigation (as that coercion applies to the person affected) may be challenged. See *United States* v. *Dionisio*, 410 U.S. at 11-12, 16-18; *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906); see also *Branzburg* v. *Hayes*, 408 U.S. at 707-708.

The parallel between the limits on judicial review of grand jury investigations and the limits on judicial review of Executive Branch investigations is not accidental. As this Court has said, "'"[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"'" (*Butz* v. *Economou*, 438 U.S. 478, 510 (1978), quoting *Yaselli* v. *Goff*, 12 F.2d 396, 404 (2d Cir. 1926) (citation omitted)). Indeed, the Court has pointed out that the grand jury depends "largely on the prosecutor's office to secure the evidence or witnesses it requires" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (footnote omitted)). Thus, it should be no surprise that the prosecutor, like the grand jury, "must be free to pursue [his] investigation unhindered by external influence or supervision * * *" (*United States* v. *Dionisio*, 410 U.S. at 17).

Indeed, an irony here is that, based on the information he had received, it would have been entirely appropriate for Russoniello to have conducted his investigation through a grand jury. Russoniello's discretionary decision to proceed less formally is fully in keeping with this Court's admonition that "[e]nforcement officials taking the initiative in grand-jury proceedings * * * should be sensitive to the considerations making for wise exercise of such investigatory power * * * where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury" (*Hoffman* v. *United States*, 341 U.S. 479, 485 (1951)). See also *United States* v. *Mara*, 410 U.S. 19, 44 (1973) (Marshall, J., dissenting).

It is no answer to these arguments that non-coercive investigative activity is often a cause for concern to those upon whom it focuses. Certainly few people welcome the opportunity to be a target or subject of official inquiry. And some may greatly resent, for legitimate or illegitimate reasons, the incompleteness of an investigation or the criteria upon which that investigation is based.[20] As is their right, these people sometimes make their views known to whatever combination of the political branches and the press seems most availing, and they are not without substantial remedies in these fora.[21] Failing relief there, however, the fear and resentment that results from being involved in or identified with a criminal investigation is simply " 'part of the social burden of living under government' " (*Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation and footnote omitted)). See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244; *Younger* v. *Harris*, 401 U.S. 37, 46-47

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[20] The affidavits that respondents have submitted indicate that the investigation of persons requesting bilingual ballots has made members of the Hispanic-American and Chinese-American communities in the San Francisco Bay Area "angry" (J.A. 58, 76), "outraged" (J.A. 76), "upset" (J.A. 52, 58, 227, 228), "bothered" (J.A. 227), "deeply concerned" (J.A. 33), and "indignant" (J.A. 222). They fear that they will be "contacted" (J.A. 45); they "resent government interference with [their] right to privacy" (J.A. 49); and they do not want "to be bothered in that way" (J.A. 52).

[21] The Justice Department, for example, has an Office of Professional Responsibility, as well as an Office of Public Integrity, and has long maintained procedures under which complaints may be filed against United States Attorneys. See 28 C.F.R. 0.39. Moreover, the American Bar Association has promulgated special standards to guide the conduct of prosecutors. See Model Code of Professional Responsibility EC 7-13 (1980). This Court has accordingly stated that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers" (*Imbler* v. *Pachtman*, 424 U.S. at 429 (footnote omitted)). See also *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 7 n.5.

(1971); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); cf. *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty[.] * * * Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."); *Blair* v. *United States*, 250 U.S. 273, 281 (1919) ("the giving of testimony and the attendance upon court or grand jury in order to testify are public duties * * * [and] [t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public"). Allegations of "chill" and "stigma" from a criminal investigation can create a justiciable controversy only when they are connected to "regulatory, proscriptive, or compulsory" action of government. See *Laird* v. *Tatum*, 408 U.S. at 11; *Heckler* v. *Chaney*, 470 U.S. at 832.

C. The Government Officials Involved In This Investigation Did Not Subject Respondents To Any Coercive Government Action

In this case, it is quite clear that respondents were not subjected to any such "regulatory, proscriptive, or compulsory" investigative or prosecutorial action. The government officials did not seek a warrant or otherwise conduct any search or seizure of respondents' persons or premises. They did not compel respondents to provide information by subpoena or custodial interrogation. And they did not bring any criminal charges.[22] Rather, Rus-

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[22] Russoniello suggested in his letter to the district attorneys that he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters. J.A. 23. But Russoniello made this suggestion without knowing the identities of the respondents (or the identities of any other person whom he could prosecute). Thus, he did nothing more than make an impersonal statement that, if he discovered federal law was being violated, he would enforce it.

soniello requested that the voter registrars of the nine counties randomly select from public records and submit to him the names of 25 recently-registered foreign-born voters who had requested bilingual election materials; the INS then searched its own records (and the records of the FBI) and verified the citizenship status of the names submited to Russoniello; and, on receiving the INS's report from Russoniello, the district attorneys conducted noncustodial interviews of various individuals whom INS had been unable positively to identify as citizens. As the district court noted, "all of the information provided by the local defendants and the INS [was] a matter of public record" (Pet. App. 84a); all interviews and contacts were voluntary and non-custodial (*id.* at 80a-81a); "nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 81a).[23] In short, there is no basis for suggesting that the government here took coercive action against anyone. Accordingly, the courts below should not have entertained respondents' challenge to the manner and scope of this voter registration fraud investigation.

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[23] Indeed, respondents introduced the declaration of only one person who was actually contacted by the government—Lilia Isabel Medina—and nothing in her testimony evidences any coercion being applied by the government. See J.A. 221-226. There is no evidence in the record indicating that the government even contacted respondent Olagues. See J.A. 42-46 (Declaration of Jose J. Olagues) (expressing fear that the government might contact him). On the contrary, the record indicates that the government had no reason to contact Olagues, since the INS's records showed that he was in fact a citizen. See J.A. 68.

III. EVEN IF JUDICIAL REVIEW OF NONCOERCIVE INVESTIGATIVE ACTIVITIES IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES, EQUITABLE RELIEF IS NOT AVAILABLE WHERE, AS HERE, THOSE INVESTIGATIVE ACTIVITIES WERE NOT CONDUCTED IN BAD FAITH OR FOR THE PURPOSE OF HARASSMENT, DO NOT VIOLATE ANY CLEARLY ESTABLISHED RIGHTS, AND ARE NOT DEVOID OF LEGITIMATE INVESTIGATIVE PURPOSE

Assuming, arguendo, that respondents' challenge to the manner and scope of a United States Attorney's noncoercive investigative activities presents a justiciable controversy, the court below nevertheless erred in remanding on the question of whether injunctive or declaratory relief should issue.[24] This Court has long held that state law enforcement efforts may be enjoined or declared unconstitutional only in "extraordinary circumstances," that is, where the law enforcement activities create a threat of irreparable injury that is "great and immediate," and have been conducted in bad faith or for purposes of harassment. No lesser restriction on judicial power should apply where federal criminal investigative activities are concerned. Since no such "extraordinary circumstances" can be found on the undisputed facts of this case, a remand is neither necessary nor permissible.

A. It is a " 'basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law' " and will not suffer irreparable injury if denied equitable relief (*Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6,

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[24] Specifically, the court of appeals directed the district court to determine whether Russoniello's investigation employed the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighs respondents' First Amendment rights (Pet. App. 19a, 20a, 23a).

1987), slip op. 7, quoting *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971)). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (*Younger* v. *Harris*, 401 U.S. at 44). Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution (*Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975)). See also *Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is available "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances"); *Trainor* v. *Hernandez*, 431 U.S. 434, 446-447 (1977) (same).

While limitations on the equity power have been most frequently articulated in cases dealing with the abstention of federal courts from intervention in pending state criminal cases (see, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. at 446-447; *Kugler* v. *Helfant*, 421 U.S. at 123-125; *Younger* v. *Harris*, 401 U.S. at 43-44; *Dombrowski* v. *Pfister*, 380 U.S. 479, 482 (1965)), this Court has also recognized the importance of judicial restraint where federal courts are asked to enjoin or declare unconstitutional state law enforcement practices, even though no criminal proceedings are pending. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976); *O'Shea* v. *Littleton*, 414 U.S. at 502. Thus, in *Lyons*, the Court rejected a prayer for equitable relief against a state police department's practice of applying "chokeholds" when making arrests, noting that "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional" (461 U.S. at 111), and that, "[i]n exercising

their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'" (*id.* at 112 (citation omitted)). Likewise, in *Rizzo*, the Court held that a federal court abused its equitable discretion in directing a police department to revise its police manuals and procedures for handling complaints of minority citizens, noting that "principles of equity * * * militate heavily against the grant of an injunction except in the most extraordinary circumstances" (423 U.S. at 379), and that "'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint'" (*id.* at 379-380 (quoting *O'Shea* v. *Littleton*, 414 U.S. at 502)).[25]

A similar restriction on the federal judiciary's exercise of its equitable powers must be recognized where federal criminal investigative activities are concerned. The separation of powers concern to protect the Executive Branch's investigative and prosecutorial authority weighs

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[25] In suggesting (Br. in Opp. 19-21) that the basic equity principles underlying this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), do not apply where a state criminal proceeding is not pending, respondents confuse the circumstances in which federal courts must "abstain" from deciding federal questions with the circumstances in which equity principles bar federal courts from issuing equitable relief. Absent "extraordinary circumstances," a federal court must "abstain" from adjudicating *any* federal question where state proceedings that will culminate in judicial review of those claims are pending. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986). In the absence of such pending proceedings, the federal court may adjudicate claims for monetary relief regardless of the circumstances (unless an immunity exists). As *Lyons*, *Rizzo* and *O'Shea* demonstrate, however, even where no state proceedings are pending, federal court may not issue injunctive or declaratory relief against law enforcement officials in the absence of "extraordinary circumstances." See *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. at 379; *O'Shea* v. *Littleton*, 414 U.S. at 502.

heavily against the allowance of judicial challenges before any formal governmental action is taken. See *Allen* v. *Wright*, 468 U.S. at 760 (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974)) ("[c]ase-or-controversy considerations * * * 'obviously shade into those determining whether the complaint states a sound basis for equitable relief' "); *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106 (same). Moreover, such governmental activities are almost always less directly intrusive on the interests of those on whom the investigation touches than is a pending prosecution where charges have been filed. See *Heckler* v. *Chaney*, 470 U.S. at 832. Thus, while their reasons differ somewhat from those articulated in *Younger* and *Lyons*,[26] the lower federal courts, with the exception of the court below, have uniformly held that, to the extent they are justiciable at all, federal criminal investigative activities may be enjoined or declared unconstitutional only in the most "extraordinary circumstances." See, *e.g.*, *Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); see also *Pollard* v. *Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), aff'd, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964). See also *North* v. *Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987) (court will

[26] The Court has held that federal court interference with state criminal prosecutions is generally inconsistent with notions of "comity" and "our Federalism" (*Younger* v. *Harris*, 401 U.S. at 44). The Court has recently made clear, however, that the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity * * * should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law' " (*Pennzoil Co.* v. *Texaco, Inc.*, slip op. 7 (quoting *Younger* v. *Harris*, 401 U.S. at 43)). Principles of comity and federalism were a "second explanation" (slip op. 7) that only "reinforced" the "underlying reason" for judicial restraint (*Younger* v. *Harris*, 401 U.S. at 44).

not enjoin investigation by special prosecutor where plaintiff has not suffered an "injury of sufficient keenness"), appeal pending No. 87-5058 (D.C. Cir.).

B. No such "extraordinary circumstances," as defined by this Court, are presented by the facts of this case. Respondents have not shown the necessary "great and immediate" irreparable injury. Nor have they introduced any evidence showing that the investigation was conducted in "bad faith," for purposes of "harassment," or in flagrant and patent violation of express constitutional prohibitions. See *Younger* v. *Harris*, 401 U.S. at 46, 53, 54; see also *City of Los Angeles* v. *Lyons*, 461 U.S. at 112. Rather, the undisputed facts are to the contrary.

1. The injuries that respondents allege in this case simply are not "great and immediate" within the meaning of the *Younger* line of cases. Respondent Olagues is an easy case in this respect. As Judge Wallace noted in dissent (Pet. App. 29a), "the result of the investigation was to demonstrate that [respondent Olagues] is a citizen, legally registered to vote." In such circumstances, there is no reason to believe that the government will again investigate Olagues as a possible noncitizen voter (who might have information about persons or groups attempting illegally to register noncitizen voters). Accordingly, even assuming that the "stigma" and "chill" respondent Olagues alleges he has suffered by virtue of the investigation is a basis for standing to seek monetary relief, respondent Olagues has no basis at all for seeking prospective equitable relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111; *O'Shea* v. *Littleton*, 414 U.S. at 499-504.

The organizational respondents do not present a much more difficult case. They claim that their voter registration and education activities were undermined by the conduct of this investigation. Yet nothing in the record indicates that the investigation ever specifically focused on these organizations or subjected them (or their members) to a reasonable threat of prosecution. Accordingly,

the "chilling effect" of which the respondent organizations complain is insufficient to provide them with standing to seek any relief, monetary or equitable. See *Laird* v. *Tatum*, 408 U.S. at 13-14; *Boyle* v. *Landry*, 401 U.S. 77, 80-81 (1971); *Davis* v. *Ichord*, 442 F.2d 1207, 1214 (D.C. Cir. 1970)). Moreover, since the challenged information-gathering activities ended five years ago and cannot realistically be expected to recur, it is especially clear that the organizations lack standing to seek equitable relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111.

Nor can the organizational respondents rely on the special sensitivities of recently-registered foreign-born persons who apparently fear that another investigation will occur (see Pet. App. 7a-8a). "It is the *reality* of the threat of repeated injury * * *, not * * * subjective apprehensions" concerning it, that is relevant (*City of Los Angeles* v. *Lyons*, 461 U.S. at 107, n.8). Accord, *O'Shea* v. *Littleton*, 414 U.S. at 498; *Steffel* v. *Thompson*, 415 U.S. 452, 476 (1974), (Stewart, J., concurring); cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) (it is "extraordinarily difficult for agencies to differentiate between 'genuine' claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted theory"). The reality here is that the investigation is over.

In any event, even if the alleged "stigma" and "chilling effects" are injuries sufficient to provide either Olagues or the organizations with standing, they clearly do not constitute the "great and immediate" irreparable injury required by the *Younger* line of cases. The harms alleged here are no greater than the injury "incidental to every criminal proceeding brought lawfully and in good faith" (*Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943)); "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution[] [cannot] by themselves be considered 'irreparable' in the special legal sense of that term" (*Younger* v. *Harris*, 401 U.S. at 46)

Moreover, respondents have already been freed of any stigma of criminal wrongdoing by the termination of the investigation, and the collateral adverse effects of which respondents complain were subject to a prayer for money damages. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-109, 111; *FTC* v. *Standard Oil Co.*, 449 U.S. at 244-245; *Younger* v. *Harris*, 401 U.S. at 46-47. Thus, the "extraordinary remedies" of injunctive or declaratory relief are simply unnecessary to remedy any injuries alleged in this case. See *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-313 (1982).

2. Furthermore, the governmental action challenged here was not conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The undisputed facts show that the United States Attorney learned through public sources of allegations that various persons or organizations may have been conspiring fraudulently to register unqualified voters. In following up on those indications of possible criminal conduct, he naturally focused the "investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more likely to recollect details than would be long-registered noncitizen voters" (Pet. App. 33a-34a). He did this by using accessible information from the voter registration form, information reflecting foreign birth, recent registration, and request for bilingual voting materials. Moreover, he terminated the investigation when it failed to produce evidence sufficient to justify further action (*id.* at 45a). Thus, there is no basis for suggesting that Russoniello engaged in any harassing or ill-motivated behavior.

That the criteria used to identify *witnesses* in some sense "targeted" persons of Chinese-American and Hispanic-American descent does not justify anticipatory judicial intervention. The Equal Protection Clause does not require prosecutors to turn a blind eye to basic

descriptive facts relevant to suspected criminal conduct or knowledge thereof. This Court has recognized that law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 24 (Stevens, J., dissenting); see also *Hon Keung Kung* v. *INS*, 356 F. Supp. 571, 575 (E.D. Mo. 1973) ("common sense [dictates] that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status"). Here, preliminary information indicated that the greatest potential for voter registration fraud existed among "persons who did not speak or understand the English language" (J.A. 178). Accordingly, it was quite reasonable for Russoniello to conclude that "recently-registered voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish him with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities" (Pet. App. 34a-35a). Indeed, by focusing his investigation in this fashion, Russoniello was able to narrow his inquiry and avoid inconveniencing as many other persons as possible.

Even the opinion of the court below makes clear that the government officials involved in this investigation did not engage in the sort of bad faith, harassment, or other extreme behavior that arguably would establish the "extraordinary circumstances" necessary for enjoining or declaring unconstitutional the activities of a prosecutor.[27]

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[27] As noted above, this Court has held that the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. at 123-124; *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971). See also *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). Thus, while it is true that there are some cases in which declaratory but not injunctive relief may be granted (see *Steffel* v. *Thompson*, 415 U.S. 452,

The court below found that "the government has a compelling interest in preventing voter registration fraud" (Pet. App. 19a), that there was no evidence that the government intended to deny or abridge respondents' right to vote (*id.* at 21a), that respondents' suit "raise[d] issues of first impression" (*id.* at 24a), and that "the government officials did not violate [any] 'clearly establised' rights" by the conduct of their investigation (*ibid.*). In short, the court of appeals conceded that Russoniello's investigation was not conducted for purposes of harassment, did not violate any clearly established rights, and had not been shown to be without a legitimate investigative purpose. Accordingly, it should have held that the requisite "extraordinary circumstances" were absent and that neither injunctive nor declaratory relief could issue in this case.

466-473 (1974)), this clearly is not such a case. As Judge Wallace noted in his original panel opinion, respondents are not "seeking a declaration that * * * [their] voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. * * * In these circumstances, * * * [d]eclaratory relief * * would raise the same concerns regarding interference with the activities of prosecuting officials [as the issuance of injunctive relief would raise]" (Pet. App. 63a-64a).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions that respondents' prayers for injunctive and declaratory relief be dismissed as moot. Alternatively, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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